SUPREME COURT, U.S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

NO. 75-1123

CHARLES K. SMITH ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

Supreme Court Of The United States

NO. 75-1123

CHARLES K. SMITH ..... Petitioner

VS.

STATE OF ARKANSAS ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

GROUNDS FOR JURISDICTION OF THE UNITED STATES SUPREME COURT

A verdict of guilty to the charge of possession of a controlled substance was entered against the Petitioner in the Cross County, Arkansas, Circuit Court, on February 4, 1975. The Arkansas Supreme Court affirmed the conviction of the Petitioner on October 6, 1975, and entered its opinion at that time. Petition for re-hearing was filed on October 23, 1975, and was denied on November 10, 1975. Petitioner filed a Motion to Recall the Mandate on November 26, 1975, and Motion to Recall was granted on December 15, 1975. (Appendix pages 9-18)

Title 28 USC, Section 1257, states:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

Questions Presented

The trial Court, affirmed by the Arkansas Supreme Court, violated Petitioner's Constitutional right of Equal Protection of the laws by inconsistent sentencing of the Petitioner, who pled not guilty, and the Co-Defendant, who pled guilty.

Constitutional Provisions Involved

The Constitutional provisions involved are Amendment Fourteen of the United States Constitution, and Article II, Section 3, of the Constitution of the State of Arkansas. (See Appendix, page 22).

STATEMENT OF THE CASE

On September 2, 1974, Charles Keith Smith, the Petitioner, James Eddie McDaniel and Mike Castleberry, were arrested in Wynne, Cross County, Arkansas by a Cross County Deputy Sheriff. The Petitioner's vehicle was searched and a quantity of marijuana was recovered.

The three young men were taken to the Cross County Sheriff's Department, Wynne, Arkansas. At this time, the three were interviewed by members of the Sheriff's department and gave statements concerning the box containing the marijuana. Charles Keith Smith, the Petitioner, stated that he thought the contents of the box was a tape recorder, since the box said Nova 10 earphones on the side. James Eddie McDaniel stated that the marijuana in the box was not Charles Keith Smith's, the Petitioner, but was his. Mike Castleberry stated that he knew nothing about what

was in the box and had just entered the car prior to the arrest. Based on this information, the Petitioner and James Eddie McDaniel were charged with possession of marijuana with intent to sell and Mike Castleberry was released. (Appendix page 19).

The Petitioner maintained his contention of innocence and his case was tried on February 4, 1975, in the Cross County Circuit Court before the Honorable Judge John Mosby. The Petitioner was represented by his retained attorney, Tom B. Smith, Attorney, Wynne, Arkansas, the trial being before a jury in which the verdict of guilty was returned recommending a minimum sentence of three (3) years in the penitentiary with no fine attached. James Eddie McDaniel entered a plea of guilty and was sentenced by the Court to three (3) years and placed on probation for the entire three (3) years duration and conditioned upon the defendant's good behavior. (Appendix pages 20, 22).

The information was filed on September 6, 1975, charging both James Eddie McDaniel and Petitioner, Charles Keith Smith, with the crime of possession of a controlled substance with intent to deliver (T. 7). Petitioner and James Eddie McDaniel, Co-Defendant, were served on September 6, 1974, with a Bench Warrant charging them with the above crime (T. 9, 11). Petitioner entered a plea of not guilty and was convicted by a jury and sentenced to three years in the penitentiary on February 4, 1975 (T. 20). Co-Defendant McDaniel pled guilty on February 6, 1975, and received a sentence of three years and was placed on probation for the term of three years (T. 23).

Petitioner's demand resulted in a harsher sentence than that received by Co-Defendant McDaniel. This point was raised on appeal stating that the Petitioner was denied equal protection of the laws. *Charles K. Smith v. State of*

Arkansas, 258 Ark. —— (October 23, 1975, T. 247, Appendix page 9). The Arkansas Supreme Court avoided the question of "equal protection under the laws" by stating that sentencing was discretionary with the trial court and the trial court had not abused its discretion.

PETITION

THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION OF THE LAWS BY INCONSISTENT SENTENCING OF THE PETITIONER, WHO PLED NOT GUILTY, AND THE CO-DEFENDANT, WHO PLED GUILTY.

Both the Constitutions of the United States and the State of Arkansas, grant equal protection of the law:

> ". . . no state shall deny to any person within its jurisdiction the equal protection of the laws." Amendment Fourteen, United States Constitution.
>
> ". . . the equality of all persons before the law is recognized, and shall forever remain inviolate; . . ." Article II, Section 3, Arkansas Constitution.

The information filed on September 6, 1974, charged both James Eddie McDaniel and Petitioner, Charles Keith Smith, with the crime of possession of a controlled substance with intent to deliver (T. 7). James Eddie McDaniel, Co-Defendant, and Petitioner, Charles Keith Smith, were served on September 6, 1974, with a Bench Warrant charging them with the crime of possessing a controlled substance with intent to deliver (T. 9, 11). Petitioner entered a plea of not guilty and was tried by a jury, convicted and sentenced by the Court to serve three (3) years at the

Arkansas Department of Corrections (T. 20) (Appendix page 20). The co-defendant entered a plea of guilty and was placed on probation for a term of three (3) years (T. 23) (Appendix page 21).

James Eddie McDaniel, if not the principal, is an accessory. He placed the "Nova 10 headphone box" into Petitioner's car when they left Memphis (T. 172, 186), which box later proved to contain the controlled substance (T. 83). He gave a sworn written statement to Deputy Sheriff Dallas that the marijuana was his and not petitioners (T. 51, 186, 240). There is no contradictory evidence in the record to these facts. Also, McDaniel pled guilty to the same charges that Petitioner pled not guilty to (T. 7, 20, 23).

Arkansas Statute 41-118 (Repl. 1964) (Appendix, page 23), abolishes the distinction between an accessory before the fact and the principal; punishment is to be the same. It is admitted that suspending a sentence is discretionary with the trial court, but considering the facts in the case, said discretion has been abused. Both charged with the same crime, same facts, only difference being McDaniel pled guilty and Petitioner pled not guilty, but they were not equal before the law.

Petitioner was denied his constitutional right of equality before the law and due process of law by being punished for pleading not guilty to the crime charged. The co-defendant was rewarded for saving the State money and time by pleading guilty.

Such a disparity of sentencing is a flagrant violation of constitutional laws guaranteeing equal justice for all. In the case of *United States v. Wiley*, 278 F. 2nd 500 (7th Cir. 1960), the Court of Appeals stated that when a defense was

not frivolous and was not presented in bad faith, the fact that defendant asked for a trial could not justify imposition of a harsher sentence upon him than upon co-defendant who had pled guilty. The *Wiley* case is similar to the one at bar. The similarity between facts and circumstances of the case at bar does not justify imposition of different sentences for the Petitioner and co-defendant. Even though defendant's effort was unsuccessful, defendant may not be punished for exercising the right to trial by jury. *Hess v. United States*, 496 F. 2nd 936 (8th Cir. 1974).

A defendant exercising his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed. Circuit Court of Appeals went on to say in the *Hess* case, supra:

> ". . . since the tenor of the court's observation is not entirely clear, and because the remedy is relatively painless, we believe the trial judge should be afforded an opportunity to fully examine his sentencing procedure and to consider the factors which motivated the sentences imposed."

If the facts involved in this case had shown more involvement of the petitioner than of the co-defendant, conceivably the trial court did not abuse its discretion in sentencing. That is not the case here. Trial court heard the testimony that both were involved. McDaniel, the co-defendant, gave a statement that the contraband was his, not the petitioner's. This fact was never disputed (T. 51, 186, 240). It is evident, under the *Wiley* case, supra, United States Constitution and the Constitution of the State of Arkansas, the Petitioner was not afforded equal protection of the law.

Society dictates equal treatment under the law which includes equal sentencing for the same or similar crimes. McDaniel's plea was entered on February 6, 1975, after the jury had returned a verdict of guilty in petitioner's case, and sentenced him to three (3) years. The court, knowing the sentiment of the jurors, failed to impose equal sentencing. Only conclusions that can be resolved from the facts are:

1. Appellant was punished for requesting a trial.
2. Co-defendant was rewarded (set free on probation) for entering a plea of guilty. Such disparity is a flagrant abuse of the trial court's discretion in sentencing.

All facts before the Court being equal, punishment should have been equal.

CONCLUSION

For all the foregoing reasons the Court should issue a Writ of Certiorari to the Arkansas Supreme Court to review and reverse the Arkansas Supreme Court decision. The actions of the Arkansas Supreme Court and the trial court were in direct violation of the Petitioner's right to equal protection of the law as guaranteed by Amendment 14 of the United States Constitution and Article II, Section 3 of the Constitution of the State of Arkansas.

Respectfully submitted,

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By: J. L. SHAVER

Attorneys for Petitioner

BLEED THROUGH

Appendix

SUPREME COURT OF ARKANSAS

NO. CR75-102

CHARLES K. SMITH, *Appellant*	Opinion Delivered October 6, 1975
v.	Appeal from Cross Circuit Court,
STATE OF ARKANSAS *Appellee*	JOHN S. MOSBY, *Judge*
	Affirmed.

FRANK HOLT, *Associate Justice*

Appellant was found guilty of possession of marijuana with the intent to deliver in violation of Ark. Stat. Ann. §82-2617 (Supp. 1973). A three year sentence in the State Department of Correction was imposed. We first consider appellant's contention that his conviction for possession with intent to deliver was contrary to the evidence and the state failed to meet its burden of proof. Appellant initially argues that most of the state's principal witnesses were "admitted drug users and sellers" and their "admitted character and lack of truthfulness" so impeached their credibility that a conviction upon the testimony of these witnesses is contrary to justice and should not be sustained. We cannot agree because the credibility of witnesses and the weight accorded to their testimony is solely within the province of the jury. *Murchison v. State*, 249 Ark. 861, 462 S.W.2d 853 (1971); *Clark v. State*, 246 Ark. 1151, 442 S.W. 2d 225 (1969); and *Rayburn v. State*, 240 Ark. 264, 398 S.W. 2d 909 (1966). Certainly it cannot be said that their testi-

mony is so inherently improbable and unbelievable that reasonable minds could not differ.

An arresting officer testified that he had information the appellant and a codefendant were in town for the purpose of selling a quantity of marijuana at a certain place and hour. The officer was waiting there when he saw the appellant drive up followed by a pickup truck. With consent, the officer searched the vehicle appellant was driving and retrieved a box which, according to the evidence, contained marijuana. The witness, who was driving the pickup truck, testified he purchased a "lid" from the appellant that afternoon and marijuana was being kept in the box under the seat where the officer found it. This witness further testified that when he drove onto the parking lot to purchase the drug, he asked the appellant if he had the marijuana and he responded "yes." Another witness testified that appellant admitted the "pot" was his. Although the state adduced other testimony to meet its burden of proof, the recited evidence alone is amply substantial when we consider it in the light most favorable to the state as we must do on appeal. *Miller v. State*, 253 Ark. 1060, 490 S.W. 2d 445 (1973).

Appellant further asserts that the trial court erred in permitting the state's expert witness, a chemist, to testify with respect to a chemical analysis. Appellant first argues that the chain of possession of the marijuana was incomplete because only a carbon copy of the receipt, which showed delivery to the chemist by the officer, was introduced. Suffice it to say there is no evidence which indicates that the carbon copy is not an exact duplicate of the original. Neither can we agree with appellant that the copy should be excluded under the best evidence rule. In *Lin*

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Mfg. Co. of Ark. v. Courison, 246 Ark. 5, 436 S.W.2d 472 (1969), we said:

> The best evidence rule comes into play when the contents of a writing or its exact wording is an issue in the case. When, as in the case at bar, the existence of the writing is merely a collateral matter, the rule does not apply.

In our view this rule of law is applicable in the case at bar. The purpose of the introduction of the receipt was to establish evidence as to a chain of possession by showing a delivery was made. It was not for the purpose of establishing the terms of a writing. Neither can we agree with the appellant that the receipt was deficient as to identification purposes. It contains the name of the deliverer (the officer) and the recipient (the chemist); describes the evidence delivered; and indicates the charges, the names of the suspects involved and the date and time of the delivery to and receipt by the Arkansas Department of Health.

Appellant also argues that the testimony of the chemist was not admissible because he was not properly qualified as an expert. It is well established that the determination of an expert's qualifications as a witness is within the sound discretion of the trial court and, absent an abuse of discretion, we do not reverse its decision. *Ray v. Fletcher*, 244 Ark. 74, 423 S.W.2d 865 (1968); and *Firemen's Insurance Co. v. Little*, 189 Ark. 640, 74 S.W.2d 777 (1934). In the case at bar, the chemist has a degree in chemistry; has worked for the Arkansas Department of Health for the past two years; had received a three to four months in-service training in a drug abuse lab; had examined hundreds of samples to determine if they contained controlled substances; and testified many times in various courts on the

subject of chemical analysis. We have no hesitance in holding the trial court did not abuse its discretion in determining the chemist sufficiently met the qualifications of an expert witness.

Appellant next contends that the trial court erred in refusing to admit, for impeachment purposes, the previous written statement of a state's witness into evidence. At trial, this witness admitted that his previous written statement was untrue. The court permitted the contents to be read to the jury; however, the court refused to admit it as an exhibit. We perceive no error. Where, as here, the witness admits he has made a contradictory statement, further proof becomes unnecessary and is inadmissible for impeachment purposes. *Humpolak v. State*, 175 Ark. 786, 300 S.W. 426 (1927).

Appellant's final contention is that the court violated his constitutional right of equal protection of the laws by sentencing him to three years in the state penitentiary and then placed his codefendant on probation for three years. Appellant argues that the only factual difference between appellant and his codefendant in the sentencing procedure is that his codefendant pleaded guilty and appellant demanded a jury trial. Therefore, appellant argues that his demand for a jury trial resulted in a harsher sentence and a disparity of sentencing is a violation of his constitutional rights which guarantee equal justice for all. To this effect appellant cites *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960) and *Hess v. United States*, 496 F. 2d 936 (8th Cir. 1974). We deem these cases inapplicable. In *Wiley* the court said:

> The record abundantly shows that the court was fully informed as to the serious prior criminal records of

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> convictions of all of Wiley's co-defendants. * * * The trial court's own remarks show that he considered Wiley 'a minor participant who stood trial.'

Even so, the trial court imposed a harsher sentence on Wiley than the other who pleaded guilty. Based upon this disparity in sentencing, the court set the sentence aside and remanded the cause with directions. The concurring opinion noted that the trial court stated it was his policy not to consider probation for a defendant who demands a jury trial. In *Hess*, the trial court indicated a harsher sentence was imposed because the defendant chose to exercise his constitutional right to a jury trial. In the case at bar, there is no evidence whatsoever that the court's sentence was influenced by the fact the appellant exercised this right. Furthermore, there was ample evidence that the activities of the appellant indicated that he was active to a greater extent in illegal drug traffic than was his codefendant. No doubt the trial court properly took this into consideration. It is well established that the trial court is accorded great discretion to impose sentences within the legal limits as well as to suspend sentences. *Thornton v. State*, 243 Ark. 829, 422 S.W.2d 852 (1968). In the case at bar, the appellant has not demonstrated any abuse of discretion.

Affirmed.

IN THE SUPREME COURT OF ARKANSAS

CHARLES K. SMITH ..... *Appellant*

VS. No. CR75-102

STATE OF ARKANSAS ..... *Appellee*

PETITION FOR RE-HEARING AND BRIEF

Comes now Charles K. Smith, Appellant, by his attorneys, Shaver & Shaver, Attorneys at Law, Wynne, Arkansas, and for his Petition for Re-Hearing and Brief, states:

The trial court is accorded great discretion to impose sentences within the legal limits, as well as to suspend sentences. Even though the trial court does have such discretion, the trial court can abuse this broad power of discretion. The trial court herein abused its discretionary powers by not giving both defendants equal sentencing. Co-Defendant, McDaniel, immediately upon arrest, gave a statement to the arresting officers that the controlled substance was his ,and not the appellant's (T. 51, 186, 240). The appellant immediately upon arrest gave a statement that the controlled substance was not his, but the Co-Defendant, McDaniel's (T. 185). These are facts that are uncontradicted. The court abused its discretion by not taking these admitted facts of involvement and equally applying the principle of equal protection under the law.

It was not until a few weeks and days before the trial of the Appellant that the additional witnesses were produced. They admitted to being drug users and dealers, and their interest in the case was to help out their buddy, James Eddie McDaniel (T. 103, 115, 138, 145, 155). These witnesses

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gave almost identical statements prepared by Co-Defendant's attorney, who was the person who contacted them. These witnesses were personally involved and had a personal interest in the outcome of the trial.

The trial court abused its discretion by not taking into consideration the character, personal relationship, and lack of truthfulness of the witnesses, and the initial statements given by the Appellant and Co-Defendant relating their involvement with the controlled substance. Certain witnesses admitted lying to the authorities on previous occasions in reference to this matter (T. 119, 104, 161, 164). The Appellant's character nor his honesty were considered by the Court. Trial courts have been held to abuse their broad powers of discretion. *Farley d/b/a Stamp Building Supply v. Jester*, 257 Ark. 686; *USA v.* 1, 129, 75 *ac of land, Cross and Poinsett Counties, Arkansas*, 473 F. 2d 996, 999 (1973).

The trial court abused its discretionary powers, in doing so it unequally punished the Appellant. The Appellant was denied both justice before the law and equal protection of the law.

Respectfully submitted,

SHAVER & SHAVER, Attorneys
P.O. Box 592
Wynne, Arkansas 72396

By: TOM B. SMITH

Attorney for Appellant

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
)SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1975, amongst others were the following proceedings, to-wit:

On the 10th day of November, A. D. 1975, a day of said term

CHARLES K. SMITH ..... *Appellant*

vs. No. CR75-102

STATE OF ARKANSAS ..... *Appellee*

Appeal from Cross Circuit Court

Rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 13th day of January, A.D. 1976.

/s/ Jimmy H. Hawkins, Clerk

By: /s/ Robin Horne, D.C.

BLEED THROUGH

IN THE SUPREME COURT OF ARKANSAS

CHARLES K. SMITH ..... *Appellant*

vs. NO. CR75-102

STATE OF ARKANSAS ..... *Appellee*

MOTION FOR RECALL OF MANDATE

Comes now the Appellant herein, Charles K. Smith, by his attorneys, Shaver & Shaver, and for his Motion for Recall of Mandate, states:

The appellant requests the Court to recall the mandate issued on November 10, 1975, to allow the Appellant to perfect his appeal and request for Writ of Certiorari to the United States Supreme Court.

The Appellant has a legitimate claim of a constitutional issue to present to the United States Supreme Court. This Motion is meritorious, and is not filed for purposes of delay.

WHEREFORE, Appellant, Charles K. Smith, prays that the Court grant his Motion for Recall of Mandate, and allow him to remain on the bond filed with the Clerk of the Circuit Court of Cross County, Arkansas, until the Motion for Recall of mandate is ruled upon, and the case ruled upon by the United States Supreme Court.

Respectfully submitted,

CHARLES K. SMITH, Appellant

SHAVER & SHAVER, Attorneys
P.O. Box 592
Wynne, Arkansas 72396

By: TOM B. SMITH

Attorneys for Appellant

CERTIFICATE OF SERVICE
NOV. 29, 1975

SHAVER & SHAVER, Attorneys

By: TOM B. SMITH

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
)SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 1975, amongst others were the following proceedings, to-wit:

On the 15th day of December, A.D. 1976, a day of said term

CHARLES K. SMITH ..... *Appellant*

vs. No. CR75-102

STATE OF ARKANSAS ..... *Appellee*

Appeal from Cross Circuit Court

Motion of appellant to recall mandate pending appeal to the United States Supreme Court is granted on condition sureties agree in writing to remain liable on bond.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 13th day of January, A.D. 1976.

/s/ Jimmy H. Hawkins, Clerk
By: /s/ Robin Horne, D.C.

BLEED THROUGH

IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS

Criminal Division

STATE OF ARKANSAS ..... *Plaintiff*

vs. No. CR74-68

CHARLES K. SMITH AND
JAMES EDDIE MCDANIEL ..... *Defendants*

INFORMATION

Comes Gerald Pearson, Prosecuting Attorney within and for the Second Judicial Circuit of the State of Arkansas, and in the name and by the authority of the State of Arkansas, accuses Charles K. Smith and James Eddie McDaniel of the crime of Possession of a controlled substance (marijuana) with intent committed to deliver as follows, to-wit: That the said Defendant(s) did on or about the 3rd day of September, 1974, in the District of Cross County, Arkansas, unlawfully, did possess a quantity of marijuana, a controlled substance, with the intent to transfer, sell or otherwise deliver to another in exchange for money or other thing of value against the peace and dignity of the State of Arkansas.

WITNESSES:

GERALD PEARSON
Prosecuting Attorney

FILED: SEPT. 6, 1974
/s/ Claude E. Brawner, Jr., Clerk
/s/ By: Peggy Jones, D.C.

IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS

Criminal Division

STATE OF ARKANSAS ..... *Plaintiff*

vs. No. CR74-68

CHARLES K. SMITH ..... *Defendant*

JUDGMENT

NOW ON THIS 4th day of February, 1975, this cause coming on to be heard, the Plaintiff appearing by David Burnett, Prosecuting Attorney within and for the Second Judicial District of Arkansas, and the defendant appearing in person and by his attorney, Tom Smith, and the defendant having waived formal arraignment and entered his plea of NOT GUILTY to the charge of possession of a controlled substance (marijuana) with intent to deliver. All parties announced ready for trial on the 4th day of February, 1975, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and argument of counsel, retired to consider its verdict, and the trial having lasted 1 day did on the 4th day of February, 1975, return into Court a verdict of guilty and fixed his punishment at a term of 3 years in the Arkansas Department of Correction.

The defendant comes on now this 4th day of February, 1975, ready for sentence. Whereupon, the Court did inform the defendant of the nature of the charge, his plea thereon, and the verdict of the jury thereon, and asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court.

BLEED THROUGH

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED that the Defendant, Charles K. Smith, is guilty as charged, and that he be and is hereby sentenced to a term of 3 years at hard labor in the Arkansas Department of Correction.

/s/ JOHN S. MOSBY
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS

Criminal Division

STATE OF ARKANSAS ..... *Plaintiff*

vs. No. CR74-68

JAMES EDDIE MCDANIEL ..... *Defendant*

JUDGMENT

NOW ON THIS 6th day of February, 1975, this cause coming on to be heard, the Plaintiff appearing by David Burnett, Prosecuting Attorney within and for the Second Judicial District of Arkansas, and the defendant appearing in person and by his attorney, Richard Proctor, and the defendant having heretofore waived formal arraignment and entered his plea of GUILTY to the charge of possession of a controlled substance with intent to deliver comes on now and announces ready for sentence.

WHEREUPON the Court did inform the defendant of the nature of the charge, his plea thereon and asked if he had any legal cause to show why judgment should not now be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the Defendant, James Eddie McDaniel, is guilty as charged, and that he be and is hereby placed on probation from this Court for a period of 3 years during and conditioned upon the defendant's good behavior.

/s/ JOHN S. MOSBY
CIRCUIT JUDGE

FILED: FEB. 11, 1975
/s/ CLAUDE E. BRAWNER, JR., Clerk
/s/ By: PEGGY JONES, D.C.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE II, SECTION 3, CONSTITUTION OF THE STATE OF ARKANSAS

"The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty on account of race, color, or previous conditions."

ARKANSAS STATUTE 41-118

"The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such. In any case of felony, when the evidence justifies, one indicted as principal may be convicted as an accessory after the facts; if indicted as accessory after the fact, he may be convicted as a principal."

SUPREME COURT, U.S.

FILED

MAR 12 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

CHARLES K. SMITH ..... *Petitioner*

vs. No. 75-1123

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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State of Arkansas

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Little Rock, Arkansas 72201

Attorneys for Respondent

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IN THE

Supreme Court Of The United States

CHARLES K. SMITH ..... *Petitioner*

vs. No. 75-1123

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas (App. to Petition) is reported at 258 Ark. 601, 528 S.W. 2d 389 (1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Equal Protection Guarantee of the United States Constitution was violated by the imposition of disparate sentences upon a co-defendant who pled guilty and one who stood trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner Smith and James E. McDaniel were arrested in Cross County, Arkansas on September 2, 1974, for possession of a controlled substance (marijuana) with intent to deliver. (App. to Petition, pg. 19) Petitioner's trial on this charge was held on February 4, 1975, and he was convicted by a jury that fixed his punishment at three years in the state penitentiary. (App. to Petition, pg. 20) Two days later, on February 6, 1975, co-defendant McDaniel pled guilty to the same charge, was sentenced by the trial court to three years and was placed on probation for that period, pending his good behavior. (App. to Petition, pg. 21-22)

The issue of the disparate sentencing of the co-defendants was raised in Petitioner's appeal to the Arkansas Supreme Court and was decided adversely to him. (App. to Petition, pg. 12-13)

ARGUMENT

I.

THE IMPOSITION OF DISPARATE SENTENCES UPON PETITIONER WHO STOOD TRIAL AND HIS CO-DEFENDANT WHO PLED GUILTY DID NOT DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

The gravamen of Petitioner's assertion is that, by exercising his constitutional right to trial by jury, he received a harsher sentence than that imposed by the trial court two days later upon his co-defendant who had pled guilty to the same charges. This discrepancy, states Petitioner, violated his constitutional guarantees of equal protection of the laws. However, Respondent asserts that, absent other persuasive factors, Petitioner's claim must fail.

A disparity between a sentence imposed upon a defendant who pleads guilty and upon another who is convicted after trial is not sufficient to establish that the latter has been punished for exercising his constitutional right to trial by jury. *United States v. Wilson*, 506 F. 2d 1252 (7th Cir. 1974). As the trial court has great discretion in its imposition of sentence, there must be present some exceptional circumstances to justify the exercise of a reviewing court's supervisory power in any action that challenges the trial court's use of the sentencing process. *Yates v. United States*, 356 U.S. 363, 366 (1958); *United States v. Kaczmark*, 490 F. 2d 1031 (7th Cir. 1974).

Petitioner fails to even allege the presence of any such exceptional circumstances; therefore, his reliance upon *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960) and *Hess v. United States*, 496 F. 2d 936 (8th Cir. 1974), is misplaced. In *Wiley*, the trial court had announced a

standing policy that it would not consider an application for probation by a defendant who pled not guilty and stood trial. 278 F. 2d at 501. In *Hess*, the tenor of the trial court's remarks at sentencing, while not conclusively supporting the defendant's allegation, was sufficiently unclear to compel an explanation of the motivating factors for the sentence from the district judge. 496 F. 2d at 938.

There is no evidence in this record that the trial court considered any improper factor when it allowed Petitioner's co-defendant a three year probationary sentence. Furthermore Petitioner received the minimum term of incarceration authorized for violation of *Ark. Stat. Ann.* §82-2617 (ii) (Supp. 1973).

The mere allegation of disparity in sentencing is insufficient to allow Petitioner the relief requested and Petitioner's claim of constitutional deprivation cannot prevail. *Griggs v. Swenson*, 352 F. Supp. 743, 745 (W.D. Mo. 1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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